IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-5845.

CATHERINE JACKSON, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

METROPOLITAN EDISON COMPANY, A PENNSYLVANIA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF THE CITY OF PHILADELPHIA, URGING AFFIRMANCE.

INTEREST OF AMICUS CURIAE.

The City of Philadelphia holds legal title to the real and personal property (including real estate, buildings, equipment, gas pipes and automobiles) of the Philadelphia

Gas Works ("PGW"), which is used in furnishing gas service to customers in the Philadelphia area. By agreement dated December 29, 1972 ("Agreement") the City effectively delivered PGW to Philadelphia Facilities Management Corporation ("PFMC"), a nonprofit corporation organized and existing under the Pennsylvania Nonprofit Corporation Law which is engaged in the operation and management of PGW. The rates, rules and regulations of PGW are subject to regulation by the Philadelphia Gas Commission, a city agency created by the Charter of the City of Philadelphia.

PGW sends monthly bills for gas service to each of 500,000 customers. Approximately thirty-eight thousand (38,000) of these bills are not paid by the due date each month and require further collection efforts. As part of the further collection efforts, the delinquent customer receives a "shut-off notice," informing him that unless his gas bill is paid within six days of receipt of the notice, his gas service will be terminated.

The use of the shut-off notice has been vital in enabling PFMC to collect the revenues needed to enable PGW to continue to provide gas service to its customers.

The response of PGW customers to the receipt of the shut-off notice has been positive. Despite the necessity of sending approximately thirty-eight thousand (38,000) shut-off notices *per month,* the actual number of shut-offs for non-payment has numbered only twenty thousand (20,000) *per year.*

Based upon the experience of PFMC and PGW, it is believed that there are approximately thirty-eight thousand (38,000) PGW customers who will not pay their gas bills until they are faced with the imminency of a discontinuance of their service and who view the shut-off notice as the last step prior to shut-off of their gas service.

The City of Philadelphia has been named a defendant in a suit brought in the United States District Court for the Eastern District of Pennsylvania, *Dawes, et al. v. Philadelphia Gas Commission, et al.*, Civil Action No. 73-2592 (E. D. Pa. Complaint filed November 15, 1973), which raises issues similar to those presented by the petitioner, Jackson, in the case at bar. In the *Dawes* case, the plaintiff likewise seeks to require the defendant public utility to provide an adversary hearing before an impartial arbitrator prior to termination of gas service. In an affidavit filed of record in that case, the General Manager of PGW has estimated that the impact upon PGW's cash flow of thirty-eight thousand (38,000) extended delinquencies per month—pending hearings of the type sought by the petitioner in this case—would be substantial and would require a readjustment of the existing tariff so as to compensate therefor at the expense of the non-delinquent subscribers. The impact upon PGW's operating expenses, were PFMC required to conduct or attend thirty-eight thousand (38,000) hearings per month, would be catastrophic, even assuming that it would be humanly possible to schedule and conduct hearings at the indicated rate of some two thousand (2,000) hearings per weekday, every weekday of the year. The alternative to conducting hearings as described above, were such hearing to be held by this Court to be a prerequisite to shut-off, would be to continue supplying gas to a substantial (and presumably growing) number of gas users who do not pay for the gas they consume—a scenario which would create, at the worst, chaos, and, at the best, the onerous, unfair burden upon the non-delinquent gas users of ever-escalating gas rates.

In the submission of the City of Philadelphia, an adversary hearing prior to termination for non-payment is not constitutionally required.

ARGUMENT.

I. Due Process Does Not Require a Public Utility to Provide an Adversary Hearing Prior to Discontinuance of Further Services.

The decisions of this Court establish that due process does not require a trial-type hearing in every conceivable case of government impairment of private interest. As Mr. Justice Stewart stated, in elaborating on this point for the Court in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961), "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

However, placing principal reliance upon a line of cases culminating in *Fuentes v. Shevin*, 407 U. S. 67 (1972), Petitioner controverts this basic axiom in the central proposition of the due process argument of her brief (Brief for Petitioner, p. 36):

> "A deperivation of a property interest or entitlement requires that the opportunity to be heard and to contest the deprivation be provided before the loss of the property or benefit. *Fuentes v. Shevin*, 407 U. S. 67 (1972); *Bell v. Burson*, 402 U. S. 535 (1971); *Goldberg v. Kelly*, 397 U. S. 254 (1970); *Boddie v. Connecticut*, 401 U. S. 371 (1971)."

Further reliance upon *Fuentes* for a "Procrustean rule of a prior adversary hearing" is misplaced, for that decision can now fairly be said to have been overruled by this Court in *Mitchell v. W. T. Grant Co.*, — U. S. —, 42 U. S. L. W. 4671 (No. 72-6160 Opinion filed May 13, 1974). In *Mitchell*, the Court substituted for the broad, inflexible requirement of a prior adversary hearing a more refined variety of due

process analysis which, it is submitted, results in a more perfect accommodation of the conflicting property rights of both buyers *and sellers* in disputes arising out of sales of tangible property. There, the Court upheld the constitutionality of a Louisiana statute authorizing seizure and sequestration of goods from a delinquent purchaser, without prior notice and without a prior adversary hearing. The Court acknowledged the continuing property interest of the seller and held that the necessity of affording adequate protection for that property interest justified postponing an adversary hearing until after the sequestration has been accomplished. Mr. Justice White there stated for the Court:

> "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. *The reality is that both seller and buyer had current real interests in the property and the definition of the property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.*"
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> *Mitchell v. W. T. Grant*, — U. S. —, 42 U. S. L. W. at 4672-4673. (Emphasis supplied.)

While the decision in *Mitchell* rested on the "duality" of the property interests involved, the case at bar presents an even more compelling case for protection of the seller's property interests and, in application to this case, the *Mitchell* rationale requires affirmance of the determination of the Court of Appeals that due process does not require

a prior adversary hearing before discontinuance of utility service for non-payment. The sale of utility service is inherently a credit transaction. The public utility provides the service and in so doing must rely on the agreement of the customer to pay for the service provided. If the customer does not pay for the service consumed, the seller has no way of recovering the electricity, gas or water which the customer has already consumed. The value of seller's property interest is reduced, by the buyer's consumption, to zero. Thus, the "duality" of property interests present in *Mitchell* is absent in this case—the seller alone bears the risk. This contrast is underscored by the analysis in *Mitchell:*

> "Wholly aside from whether the buyer, with possession and power over the property, will destroy or make away with the goods, the buyer in possession of consumer goods will undeniably put the property to its intended use, and the resale value of the merchandise will steadily decline as it is used over a period of time. Any installment seller anticipates as much, but he is normally protected because the buyer's installment payments keep pace with the deterioration in value of the security. Clearly, if payments cease and possession and use by the buyer continue, the seller's interest in property as security is steadily and irretrievably eroded until the time at which the full hearing is held."
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> *Mitchell v. W. T. Grant Co.*, — U. S. —, 42 U. S. L. W. at 4674.

Under the more flexible approach of *Mitchell*, it is submitted that the seller's increased risk, together with the absence of risk to any property interest of the buyer, justifies termination of service for non-payment without a prior adversary hearing.

Thus conceived, the case of termination of utility service for non-payment of utility bills may be placed on a spectrum of due process decisions of this Court. At one end of that spectrum is *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), involving the prejudgment garnishment of wages, where the suing creditor had *no* prior interest in the property attached. That opinion "did not purport to govern the typical use of the installment seller who brings a suit to collect an unpaid balance and who does not seek to attach wages pending the outcome of the suit but to repossess the sold property on which he had retained a lien to secure the purchase price." *Mitchell v. W. T. Grant Co.*, — U. S. —, 42 U. S. L. W. at 4676. No "duality" of property interests was involved in *Sniadach*, and prejudgment garnishment of wages was held unconstitutional.

Mitchell v. W. T. Grant Co., supra, did involve property interests of *both* the seller and the buyer, and the "duality" of property interests was held to be a decisive factor in the decision in that case upholding sequestration of the goods in question, without prior notice and an adversary hearing.

The case at bar is the polar opposite of *Sniadach*. In *Sniadach*, the seller had no prior interest in the property to be attached in the hands of the buyer. In this case, unlike *Sniadach* and *Mitchell*, the seller *alone* has a property interest in the goods to be withheld. It is submitted, therefore, that the rationale of *Mitchell* is applicable with even greater force under the circumstances of this case.

Petitioner's reliance upon an overly broad reading of the entitlement cases, *Bell v. Burson*, 402 U. S. 535 (1971) and *Goldberg v. Kelly*, 397 U. S. 254 (1970) is likewise misplaced. The special circumstances of *Goldberg v. Kelly, supra*, were emphasized in the opinion. There, the Court agreed with the observation in *Kelly v. Wyman*, 294 F. Supp. 893, 899 (S. D. N. Y. 1968), that "[b]y hypothesis, a

welfare recipient is destitute, without funds or assets." 397 U. S. at 261.

Of course, no such assumption is justified in the case of delinquent utility customers. Nor does the lack of electric service pending resolution of the controversy over an unpaid bill deprive the customer of "the very means by which to live while he waits," as was observed of welfare benefits in *Goldberg v. Kelly*, 397 U. S. at 264.

The attempt to apply the rationale of *Goldberg v. Kelly, supra*, to this case is, in actuality, an attempt to take the argument of that case one step beyond its holding.

Moreover, the entitlement cases do not provide an apt analogy to the case of public utility terminations for nonpayment. Provision of utility service involves the sale of a commodity; it does not purport to be, nor does it qualify as, a "governmental benefit" within the scope of that term as used in *Goldberg v. Kelly*, 397 U. S. at 263. Further, as the Court of Appeals observed (A-90, n. 14), the entitlement cases generally deal with a privilege or right conferred by the State of something which it alone can grant.

Quite apart from these general considerations distinguishing the entitlement cases from this case is a special feature of *Bell v. Burson, supra*, where the Court struck down a provision of Georgia's Motor Vehicle Safety Responsibility Act providing that the license of an uninsured motorist involved in an accident shall be suspended unless he posts security to cover the amount of damages claimed by aggrieved parties in reports of the accident. As is evident from the Court's citation in *Bell v. Burson*, 402 U. S. at 539, of *Shapiro v. Thompson*, 394 U. S. 618 (1969), an equal protection decision, the result in *Bell v. Burson, supra*, was predicated on alternative holdings, first upon the ground that the Georgia statute created an impermissible classification, of Georgia-licensed drivers who had been "in

any manner involved" in an accident, which did not bear a reasonable relationship to the legitimate state interest involved, and was therefore violative of the Equal Protection Clause. It is submitted that the result is only *alternatively* predicated on the due process holding relied upon by the Petitioner in this case, and that the due process holding was not necessary for the decision of the case.

The public employment cases cited by Petitioner, such as *Perry v. Sindermann*, 408 U. S. 593 (1972), again involve determinations by state or federal governmental officials which directly affect the aggrieved citizen's means of life and source of income, as in *Goldberg v. Kelly*. To the extent that it rests upon due process principles, the same is true of *Bell v. Burson, supra*. It is submitted that these cases are inapposite for that reason.

II. Conclusion.

For all of the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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